

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

EHOSTAR SATELLITE LLC, a Colorado  
corporation; EHOSTAR TECHNOLOGIES  
CORPORATION, a Texas corporation, and  
NAGRASTAR LLC, a Colorado corporation,

Plaintiffs,

v.

FINISAR CORPORATION, a Delaware  
corporation,

Defendant.

Civil Action No. 06-0425-JJF

**PLAINTIFF'S REPLY TO FINISAR'S RESPONSE TO  
EHOSTAR'S NOVEMBER 13, 2006 LETTER TO THE COURT**

OF COUNSEL:

Harold J. McElhinny  
Rachel Krevans  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105  
(415) 268-7000

-and-

William J. Kuhne  
MORRISON & FOERSTER LLP  
1290 Avenue of the Americas  
New York, New York 10104-0050  
(212) 468-8000

Josy W. Ingersoll (No. 1088)  
Richard H. Morse (No. 531)  
Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17th Floor  
Wilmington, Delaware 19899  
(302) 571-6672  
*jingersoll@ycst.com*

Attorneys for Plaintiffs EchoStar  
Satellite LLC, EchoStar Technologies  
Corporation, and NagraStar LLC

DATED: November 17, 2006

On November 9, 2006, Judge Alsup denied Finisar's motion to dismiss Comcast's complaint for a declaratory judgment of invalidity and noninfringement of United States Patent No. 5,404,505 (the "'505 patent"). See *Comcast Cable Commc'ns Corp. v. Finisar Corp.*, No. C 06-04206 WHA (N.D. Cal. Nov. 9, 2006) ("*Comcast Order*"). Plaintiffs (collectively, "EchoStar") submitted the *Comcast Order* to the Court on November 13, 2006, without argument because Judge Alsup's short order clearly demonstrates that Finisar's motion to dismiss EchoStar's Complaint should be rejected. Rather than concede that the *Comcast Order* dooms its motion to dismiss EchoStar's complaint, Finisar has filed a "response" in which it attempts to distinguish the order through incorrect factual and legal arguments (*see* D.I. 26).<sup>1</sup>

Finisar argues that there is a "fundamental factual distinction" between the facts in *Comcast* and this case. (D.I. 26 at 1.) Finisar is wrong. Judge Alsup found that Finisar's "subtler conduct"<sup>2</sup> created a reasonable apprehension of suit for three reasons, each of which applies here. First, Finisar sued DirecTV on the '505 patent and directed Comcast to the \$78.9 million verdict in that case. *Comcast Order* at 4. Similarly, Finisar told EchoStar that its suit against DirecTV demonstrated the strength of the '505 patent, and Finisar publicly announced the DirecTV verdict and its intent to enforce its intellectual property. (D.I. 13 at 3-4.) Second, Finisar initiated contact with Comcast regarding the '505 patent, *Comcast Order* at 4, just as it did with EchoStar (*see* D.I. 13 at 2). Third, a Finisar press release stated that Finisar sued DirecTV after unsuccessful attempts to engage DirecTV in licensing discussions and Finisar's attempts to engage Comcast also failed. *Comcast Order* at 4. Finisar likewise failed successfully

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<sup>1</sup> There is no provision in the Local Rules for such a "response" but because Finisar has filed it, EchoStar files this reply responding to Finisar's arguments.

<sup>2</sup> Finisar never accused Comcast of infringing the '505 patent. *Comcast Order* at 4. In contrast, Finisar has repeatedly accused EchoStar of infringing the '505 patent.

to engage EchoStar in licensing negotiations, never receiving a response to the single settlement offer sent to EchoStar on June 16, 2005. (D.I. 13 at 3.) In fact, while Finisar and EchoStar had not communicated for a year before EchoStar filed suit (D.I. 13 at 3-4), Finisar offered to extend a license to Comcast less than a month before Comcast filed suit, *see Comcast Order* at 2. The *Comcast Order* is directly on point.

Finisar also misapplies the law in arguing that the *Comcast Order* “cannot make up for the total absence of any evidence that EchoStar had an apprehension of litigation when it filed this suit.” (D.I. 26 at 2.) Judge Alsup did not rely on a declaration from Comcast in finding that a reasonable apprehension of suit existed, because the “reasonable apprehension” standard is an objective standard. *See Vanguard Research, Inc. v. Peat, Inc.*, 304 F.3d 1249, 1255 (Fed. Cir. 2002) (citation omitted). This standard “looks to *defendant’s* conduct” to see if defendant has demonstrated an “intent to enforce its patent.” *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 737 (Fed. Cir. 1988) (emphasis added). “Indeed, it is the objective words and actions of the patentee that are controlling.” *BP Chems. Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 979 (Fed. Cir. 1993). The evidence before the Court shows that Finisar repeatedly accused EchoStar of infringing the ’505 patent and demonstrated its intent to enforce that patent.

Judge Alsup’s clear and concise order is directly on point and demonstrates that Finisar’s motion to dismiss EchoStar’s complaint should be denied. Finisar’s conduct gave rise to a reasonable apprehension of suit. Finisar’s motion to dismiss EchoStar’s complaint should be denied.

DATED: November 17, 2006

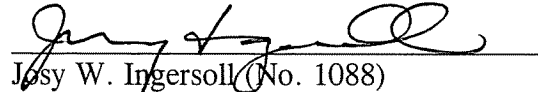
Respectfully submitted,

OF COUNSEL:

Harold J. McElhinny  
Rachel Krevans  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, California 94105  
(415) 268-7000

-and-

William J. Kuhne  
Morrison & Foerster LLP  
1290 Avenue of the Americas  
New York, New York 10104-0050  
(212) 468-8000

  
Josy W. Ingersoll (No. 1088)  
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Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17th Floor  
Wilmington, Delaware 19899  
(302) 571-6672  
[jingersoll@ycst.com](mailto:jingersoll@ycst.com)

Attorneys for Plaintiffs EchoStar  
Satellite LLC, EchoStar Technologies  
Corporation, and NagraStar LLC

**CERTIFICATE OF SERVICE**

I, Andrew A. Lundgren, Esquire, hereby certify that on November 17, 2006, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

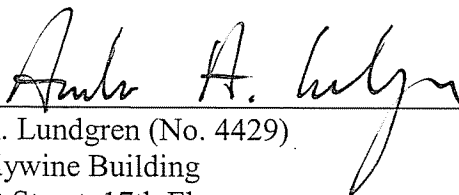
Arthur G. Connolly, III, Esquire  
Connolly, Bove, Lodge & Hutz LLP  
The Nemours Building  
1007 North Orange Street  
Wilmington, DE 19801

I further certify that on November 17, 2006, I caused a copy of the foregoing document to be served by hand delivery on the above-listed counsel of record and on the following non-registered participants in the manner indicated:

**BY E-MAIL**

Thomas B. Kenworthy, Esquire [tkenworthy@morganlewis.com]  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103

YOUNG CONAWAY STARGATT & TAYLOR, LLP

  
\_\_\_\_\_  
Andrew A. Lundgren (No. 4429)  
The Brandywine Building  
1000 West Street, 17th Floor  
Wilmington, Delaware 19801  
(302) 571-6600  
alundgren@ycst.com

Attorneys for Plaintiffs